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No. 26

# In the Supreme Court of the United States

OCTOBER TERM, 1946

UNITED STATES OF AMERICA, PETITIONER

*v.*

ALCEA BAND OF TILLAMOOKS, ET AL.

*ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS*

## SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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## SUPPLEMENTAL BRIEF FOR THE UNITED STATES

### STATEMENT

Oral argument in this case was concluded on February 1, 1946. On April 1, 1946, an order was entered whereby the case was restored to the docket for reargument before a full bench. In this brief the Government will supplement its discussion of the scope and effect of the special jurisdictional Act as contained in its original brief at pages 16–19.

### ARGUMENT

#### THE JURISDICTIONAL ACT DID NOT CREATE A LIABILITY

It is axiomatic that the United States, just as any other sovereign, can not be sued without

its consent.[1] Thus, for sixty-five years following the adoption of the Constitution, in the absence of any consent to sue the Government, Congress itself, with some assistance from the executive departments, attempted to examine and determine all claims against the United States as an incident of its power to pay the debts of the Nation. As the number of claims multiplied and this practice became more burdensome to Congress and the executive departments, Congress in 1855 established the Court of Claims and delegated to it the examination and determination of all claims within certain classes. The court's authority was gradually expanded until its present basic jurisdiction to render money judgments[2] against the United States was crystalized by Section 1 of the Tucker Act of March 3, 1887, 24 Stat. 505, 28 U. S. C. sec. 250, such jurisdiction being complemented by a great variety of

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[1] Mr. Justice Holmes supported the doctrine of sovereign immunity "not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." *Kawananakoa* v. *Polyblank*, 205 U. S. 349, 353.

[2] In addition to the jurisdiction to render money judgments, the Court of Claims also has jurisdiction to issue advisory opinions in cases referred to it by either House of Congress pursuant to Section 14 of the Tucker Act, as amended, 28 U. S. C., sec. 257. See *Pocono Pines Hotels Co.* v. *United States*, 73 C. Cls. 447, 487–492; *Choctaw & Chickasaw Nations* v. *United States*, 88 C. Cls. 271.

special jurisdictional Acts.[3] However, "the Court of Claims has no general jurisdiction over claims against the United States and can take cognizance only of those which by the terms of some act of Congress are committed to it." *Thurston* v. *United States,* 232 U. S. 469, 476. Hence, as a corollary to the principle of sovereign immunity from suit, it has become well settled that, when Congress permits suit against the Government, the jurisdictional Act must be strictly construed, and that any implications as to jurisdiction under its terms are forbidden. *United States* v. *Goltra,* 312 U. S. 203, 210–211; *United States* v. *Sherwood,* 312 U. S. 584; *Klamath Indians* v. *United States,* 296 U. S. 244, 250; *Eastern Transp. Co.* v. *United States,* 272 U. S. 675, 686; *Blackfeather* v. *United States,* 190 U. S. 368; *Price* v. *United States and Osage Indians,* 174 U. S. 373, 375–376; *Tillson* v. *United States,* 100 U. S. 43, 46; *Sioux Tribe of Indians* v. *United States,* 97 C. Cls. 613, 663–666, 682, certiorari denied, 318 U. S. 789.

In view of the above, it naturally follows that, absent a plain indication by Congress to the contrary, the jurisdictional Act involved in the instant case, Appendix, *infra,* p. 15, does not

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[3] For discussions of the development and nature of the jurisdiction of the Court of Claims, see *Williams* v. *United States,* 289 U. S. 553, 562–581; *Ex parte Bakelite Corp'n,* 279 U. S. 438, 452–455; *Pocono Pines Hotels Co.* v. *United States,* 73 C. Cls. 447, 466–502.

admit or create any legal liability on the part of the Government, but merely provides "a forum for the adjudication of the claim according to applicable legal principles." *United States* v. *Mille Lac Chippewas*, 229 U. S. 498, 500. In other words, the special Act removes the impediment of sovereign immunity from suit, but otherwise leaves the parties in the same legal position as before. *Shoshone Tribe* v. *United States*, 299 U. S. 476, 493; *Boston Sand Co.* v. *United States*, 278 U. S. 41, 46–47; *Sioux Indians* v. *United States*, 277 U. S. 424, 436; *Pine Hill Co.* v. *United States*, 259 U. S. 191, 196; *Turner* v. *United States*, 248 U. S. 354, 358; *Oakes* v. *United States*, 174 U. S. 778, 785; *United States* v. *Old Settlers*, 148 U. S. 427, 469; *United States* v. *Durrance*, 101 F. 2d 109, 110 (C. C. A. 5); *Creech* v. *United States*, 102 C. Cls. 301, 323, certiorari denied, 325 U. S. 870; *The Oyster Cases*, 94 C. Cls. 397, 413–414; *Randall* v. *United States*, 71 C. Cls. 152, 156, certiorari denied, 283 U. S. 826; *Stanton* v. *United States*, 68 C. Cls. 379, 389–390. As Mr. Justice Holmes said of a similar jurisdictional Act in *The Sac and Fox Indians*, 220 U. S. 481, 489, "A merely moral claim is not made the foundation of a possible recovery. Something must be shown that amounts to a right." See also *Klamath Indians* v. *United States*, 296 U. S. 244, 255; *United States* v. *Old Settlers*, 148 U. S. 427, 469.

It is true that Congress may and often does create a legal liability where none existed against the Government or transform a moral obligation into an actionable wrong, but when it does so such an intention is clearly manifested by the language of the special jurisdictional Act and the circumstances under which it was enacted. Cf. *Pope* v. *United States*, 323 U. S. 1; *United States* v. *Goltra*, 312 U. S. 203; *United States* v. *Klamath Indians*, 304 U. S. 119; *Klamath Indians* v. *United States*, 296 U. S. 244, 250–251; *Thompson* v. *United States*, 246 U. S. 547, 551; *The Menominee Tribe of Indians* v. *United States*, 101 C. Cls. 10, 19; *The Indians of California* v. *United States*, 98 C. Cls. 583, 599, certiorari denied, 319 U. S. 764; *Garrett* v. *United States*, 70 C. Cls. 304. Moreover, it has been the practice of Congress to create liability on the part of the Government only when there had been a prior judicial determination adverse to the claimant or when the amount of the liability was liquidated or so readily ascertainable that Congress clearly knew the extent of the newly incurred obligation.[4] Otherwise, rather than sub-

[4] For example, in the *Pope*, *Goltra*, and second *Klamath* cases there had been prior determinations that the United States was not liable on the claims for which consent to be sued had been granted. See also *Choctaw Nation* v. *United States*, 119 U. S. 1, 29–30; *Delaware Tribe* v. *United States*, 72 C. Cls. 483; *id.* 525; 75 C. Cls. 368. Absent a prior determination, Congress has in the jurisdictional acts limited the amount of recovery. Thus in the *Pope* case Congress "in ef-

jecting the Government to a liability uncertain both in law and in amount, Congress has customarily referred claims resting on moral obligations or involving amounts of money as to which there was serious dispute to the Court of Claims for advisory opinions pursuant to Section 151 of the Judicial Code (28 U. S. C., sec. 257). Cf. *The Osage Tribe of Indians* v. *United States*, 102 C. Cls. 545; *Choctaw & Chickasaw Nations* v. *United States*, 88 C. Cls. 271; *Pawnee Indians* v. *United States*, 56 C. Cls. 1; *Yankton Sioux* v. *United States*, 53 C. Cls. 67; *Sisseton and Wahpeton Indians* v. *United States*, 39 C. Cls. 172; *id.* 42 C. Cls. 416. This practice of referring claims for advisory opinions is another reason for strictly construing special Acts against the admission or creation of liability. Cf. *Stanton* v. *United States*, 68 C. Cls. 379, 390; *Bodkin* v. *United States*, 67 C. Cls. 281, certiorari denied, 280 U. S. 572.

The present jurisdictional Act (Appendix, *infra*, p. 15) and the circumstances under which it was enacted present none of the indicia of a

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fect consented to judgment in an amount to be ascertained by reference to the specified data" (323 U. S. at p. 11), while in the *California Indians* case the amount of recovery was almost definitely defined in the jurisdictional Act (98 C. Cls. at p. 599). In the jurisdictional Act involved in the *Garrett* case the total liability of the Government was specifically delimited (70 C. Cls. at p. 312), and a similar procedure was followed in the Civil War Abandoned Property Act of March 3, 1863 (12 Stat. 820). See *Intermingled Cotton Cases*, 92 U. S. 651.

congressional intention to create a new liability. The Act itself clearly waives only the Government's immunity from suit and the statute of limitations, and can no more be considered to admit liability than any of the countless statutes as to which the same contention has been rejected. The legislative history (S. Rep. 795 and H. Rep. No. 1085, 74th Cong., 1st sess.) shows only that respondent Indians believed they had valid legal claims for the takings of their lands and desired a judicial determination thereof. If, as respondents, alleged, their claims were valid and lacked only consent for suit to effect their realization, there was no necessity for Congress even to consider the possibility of subjecting the Government to any new type of liability. It is plain, therefore, that without determing the merits of the claims or the moral obligation of the sovereign, Congress merely sent the case to the Court of Claims for decision on the alleged legal claim, leaving the way open for more thorough examination later in the event the claims were rejected as a matter of law. Cf. *Klamath Indians* v. *United States*, 296 U. S. 244, 255; *United States* v. *Klamath Indians*, 304 U. S. 119. Moreover, even while the bill was pending in Congress some of respondent bands had not yet formulated their claims, so that it was not possible to estimate accurately the total amount alleged to be due. S. Rep. No. 795 and H. Rep.

No. 1085, 74th Cong., 1st sess. In view of the practice to refrain from recognizing moral obligations without having definite knowledge as to the extent of the new liability and placing a limitation on the amount of recovery (*Pope* v. *United States*, 323 U. S. 1; *The Indians of California* v. *United States*, 98 C. Cls. 583, certiorari denied, 319 U. S. 764), if Congress were contemplating payment regardless of legal liability, it would have either made that intention clear as it has done in other cases,[5] or else referred the case to the Court of Claims for an advisory opinion under Section 151 of the Judicial Code.

The fact that the jurisdictional Act (Appendix, *infra*, p. 15) authorized the Court of Claims to adjudicate all "legal and equitable claims" does not militate against the strict construction contended for by the Government. The phrases "legal and equitable claims", "as justice and equity shall require", and similar phrases are found in practically all special jurisdictional Acts (see lists in Cohen, *Handbook of Federal Indian Law* (1942), p. 374, footnotes 102, 103, 106, 107 and 109), but these phrases are restricted in meaning and in no sense does the term "equitable" connote "moral". *Klamath Indians* v. *United States*, 296 U. S. 244, 250, 253; *The Sac and Fox Indians*, 220 U. S. 481, 489; cf. *Tillson* v. *United States*, 100 U. S. 43, 46.

[5] See cases cited *supra*, p. 5.

The reason for their presence is found in the history of the development of the jurisdiction of the Court of Claims. In the beginning the court had no equity jurisdiction, but was restricted in its jurisdiction to those causes cognizable in a court of law. *Bonner* v. *United States,* 9 Wall. 156, 159; *United States* v. *Gillis,* 95 U. S. 407, 412. Equity jurisdiction could be exercised only pursuant to a special Act. *United States* v. *Milliken Imprinting Co.,* 202 U. S. 168, 173–174; *Harvey* v. *United States,* 105 U. S. 671, 690. Hence, it is clear that the only purpose of the word "equitable" is to confer upon the Court of Claims the jurisdiction of a court of equity as well as a law court and to insure that claims cognizable in equity could be considered. *United States* v. *Old Settlers,* 148 U. S. 427, 469; cf. *Seminole Nation* v. *United States,* 316 U. S. 286, 295–296.

It is not a valid objection to the strict construction of the special Act that, if it is held as a matter of law that there is no liability for the taking of original Indian title, Congress would have sent respondents on a vain quest for relief. See *United States* v. *Cumming,* 130 U. S. 452, 455; *Haskell* v. *United States,* 9 C. Cls. 410, 414. Under this Act, respondents would have been entitled to recover if they proved recognition of their title by the United States (see the Government's main brief, pp. 33–37). Moreover, it is not unusual that suits against private litigants

are dismissed for failure to state a cause of action, and Congress plainly did not intend to place the United States in a more disadvantageous position than private defendants. Congress did not purport to be deciding the merits of respondents' claims, but merely supplied the judicial forum requested by the claimants. Since at the time the jurisdictional Act was passed there had been no square holding by this Court on the legal question whether there is liability for the taking of original Indian title, it was only appropriate that the legislative body consent to judicial determination of the question before considering whether respondents should be compensated regardless of liability in law.

The brief of the *amici curiae* refers (pp. 14–15) to the President's statement, issued at the time the Indian Claims Commission Act (Pub. No. 726, 79th Cong., 2d sess.)* was signed, as "the most recent official recognition of the traditional policy of this country, contrary to the contention of appellant, that Indian title is a property right". But the absence of such alleged policy clearly appears from consideration of a bill relating to the Salish and Kootenai Tribes of Indians at the same session of Congress. The Bill (H. R. 2678,

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* This Act established a special commission to pass upon various claims of Indian Tribes. Its construction is not, of course, presented in the instant case. Section 11 of the Act provides that any suit pending in the Supreme Court shall not be transferred to the commission.

79th Cong., 2d sess.) referred to lands "formerly belonging to or possessed by said Indians". In reporting his views on the bill, the Attorney General stated "The use of the words 'or possessed by' would seem to be inappropriate, since it might be contended that these words permit the assertion of claims for lands which the Indians may claim to have held by possessory occupancy, but which may never have been held by those Indians under a recognized Indian title" (H. Rep. No. 2050, 79th Cong., 2d sess., p. 5). However, the bill was passed by both houses, and was submitted to the President for signature. On June 28, 1946, the bill was vetoed, the President's message stating in part (92 Cong. Rec., pp. 8117–8118):

> In addition to other objectionable features of the bill, an attempt is made in its provisions to define the "grounds for equitable relief" and the basis upon which the court shall render judgment in favor of the Indians and award them just compensation "as for a taking under the power of eminent domain". It is possible that under the provisions of the bill the use by the United States of any lands "formerly * * * possessed" by the Indians even though the Indians were without any recognized title would constitute a sufficient basis "for equitable relief" and "for a taking under the power of eminent domain". Thus the bill does not merely waive the statute of limitations and laches, and provide a forum for the adjudication

> of any preexisting claims which the Indians may have against the United States, but it seeks to create liability against the Government which would not otherwise exist. Moreover, by providing for the payment of just compensation, the bill would probably require the Government to pay interest, for a period of more than 30 years, on a claim that did not even exist prior to its passage. Neither on legal nor moral grounds would there seem to be any justification for legislation of this kind.

Thereafter two new bills were introduced (S. 2428, H. R. 6983, 79th Cong., 2d sess.) and one of these was passed, the Senate Committee reporting that "The bill in its present form eliminates the features of H. R. 2678 which were objected to by the President in his veto message". (S. Rep. No. 1714, 79th Cong., 2d sess.; see 92 Cong. Rec. pp. 9086, 9343, 9545, 9623). The Committee made this report to the Senate on the same day that it reported the Indians Claims Commission Act (S. Rep. No. 1715, 79th Cong., 2d sess.; see 92 Cong. Rec. p. 9086).

Nor is this the first occasion upon which a bill which contained language which might have authorized recovery upon an unrecognized Indian title was vetoed. In *Duwamish, et al. Indians* v. *United States*, 79 C. Cls. 530, the court quoted (p. 599) a veto message of President Franklin D.

Roosevelt of a special jurisdictional Act; the message stated in part:

> Recognition of Indian title is a purely political matter and can be accorded solely by the sovereign. Section 4 of this act might fasten upon the United States liability for the payment of the value of land which they had never recognized as belonging to these particular Indians solely because some official of the United States, minor or otherwise, had "recognized" title and occupancy by long possession as being in these particular Indians.

These actions represent additional instances of recognition of the fact that the Government's obligation upon taking Indian lands occupied under a temporary right of occupancy is a moral or political obligation, not a legal one (the Government's main brief, pp. 19–33) and confirm the view that the jurisdictional Act was not intended to be an assumption of liability for such a moral obligation.

## CONCLUSION

Inasmuch as the jurisdictional Act does not admit or create a liability, respondents can recover only if in law the United States must make compensation for the taking of unrecognized Indian title, or if in fact respondents' title has been formally recognized. As has been shown in the Government's main brief, the taking of unrecognized Indian title does not impose any govern-

mental liability and respondents' title has not been recognized. It is, therefore, respectfully submitted that the judgment of the Court of Claims should be reversed and with directions to dismiss the petition.

J. HOWARD MCGRATH,
*Solicitor General.*
DAVID L. BAZELON,
*Assistant Attorney General.*
ROGER P. MARQUIS,
WALTER J. CUMMINGS, JR.,
*Attorneys.*

OCTOBER 1946.

## APPENDIX

The pertinent portions of the jurdisdictional Act of August 26, 1935, 49 Stat. 801, are as follows:

> * * * That jurisdiction is hereby conferred on the Court of Claims with the right of appeal to the Supreme Court of the United States by either party, as in other cases, to hear, examine, adjudicate, and render final judgment * * * (b) [in] any and all legal and equitable claims arising under or growing out of the original Indian title, claim, or rights in, to, or upon the whole or any part of the lands and their appurtenances occupied by the Indian tribes and bands described in the unratified treaties published in Senate Executive Document numbered 25, Fifty-third Congress, first session (pp. 8 to 15), at and long prior to the dates thereof, except the Coos Bay, Lower Umpqua, and Siuslaw Tribes, it being the intention of this Act to include all the Indian tribes or bands and their descendants, with the exceptions named, residing in the then Territory of Oregon west of the Cascade Range at and long prior to the dates of the said unratified treaties, some of whom, in 1855, or later, were removed by the military authorities of the United States to the Coast Range, the Grande Ronde, and the Siletz Reservations in said Territory.
>
> SEC. 2. That if any claim or claims be submitted to said courts hereunder they shall settle the rights therein, both legal and equitable, of each and all the parties thereto, notwithstanding the lapse of time or the statutes of limitation; * * *.



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